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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DONALD E. FARRAR, et al.,
Petitioners,

vs.

FRANCHISE TAX BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT

BRIEF OF RESPONDENT FRANCHISE TAX BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of the
State of California
TIMOTHY G. LADDISH
Assistant Attorney General
RICHARD F. FINN, Supervising
Deputy Attorney General
JOYCE E. HEE*
Deputy Attorney General
(*Counsel of Record)
455 Golden Gate Ave., Rm 6200
San Francisco, CA 94102-3658
Telephone: (510) 286-4044

Counsel for Respondent

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QUESTION PRESENTED

Is the California Court of Appeal's holding that the class claim filing requirements of Revenue and Taxation Code section 19055 must be strictly enforced and that petitioners' failure to comply with such requirements precludes certification of a class action for refund of taxes in this case, an independent and constitutionally adequate state ground?

PARTIES TO THE PROCEEDING

Petitioners are Donald Farrar and his wife, Joan Farrar. Respondent is the Franchise Tax Board, an agency of the State of California.

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DONALD E. FARRAR, et al.,
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FRANCHISE TAX BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR

BRIEF OF RESPONDENT FRANCHISE TAX BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioners invoke jurisdiction under 28 U.S.C. § 1257(a). Respondent Franchise Tax Board asserts that there is no jurisdiction because the California holding challenged by the petition is an independent and adequate state ground.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, article VI, clause 2 ("Supremacy Clause") provides, in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. 31 U.S.C. Section 3124(a) provides, in pertinent part:

> "Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax. . . ."

3. The California Constitution, article XIII, section 32 provides:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

4. California Revenue and Taxation Code section 19055, as amended in 1986, provides, in its entirety:

> "Every claim for a refund shall be in writing, shall be signed by the taxpayer or the taxpayer's authorized representative, and shall state the specific grounds

upon which it is founded. A claim filed for or on behalf of a class of taxpayers shall do all of the following:

"(a) Be accompanied by written authorization from each taxpayer sought to be included in the class.

"(b) Be signed by each taxpayer or taxpayer's authorized representative.

"(c) State the specific grounds on which the claim is founded."

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners repeatedly make assertions in their Statement of the Case and in the body of the petition for writ of certiorari, that have no basis in the record and are contrary to the specific factual findings of the trial court below. The substance of those erroneous assertions is that the Franchise Tax Board [hereinafter, "Board"] took affirmative steps to impede and "discourage refund claims for the post-1981 tax years." (See Petition, pages 4-5.) In order to clarify the record and rectify petitioners' misstatements, respondent provides the following factual background of this case.

The petition seeks review of the Court of Appeal's decision which affirmed the lower court's refusal to certify a class action seeking a judicial refund of income taxes collected by the Board. In so affirming, the Court of Appeal held that the plain language of Revenue and Taxation Code section 19055, which sets forth mandatory class claim filing requirements (such as written authorization from each taxpayer sought to be included in the class and the signature of each such taxpayer or his or

her authorized representative) as a prerequisite to filing a class action lawsuit to obtain tax refunds, "means what it says" and that it should be enforced on that basis.[1/] (Petition, A-1.) The Court of Appeal held that "would-be representatives who fail to take section 19055 at face value cannot invoke the doctrine of substantial compliance otherwise applicable to class actions." (Petition, A-2.) The appellate court found that petitioners "made no real attempt to comply with section 19055 until after they commenced [their refund] action." (Petition, A-7.) The court further found that the class claim filing requirements of Section 19055 are consistent with the type of procedural protections permitted by this Court in *McKesson Corp.* v. *Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990).

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1. All section references hereinafter refer to the California Revenue and Taxation Code unless otherwise indicated.

Prior to the 1986 amendment, Section 19055 provided that "[e]very claim for refund shall be in writing and shall state the specific grounds upon which it is founded."

Section 19055 subsequently was amended in 1986 to read as follows:

> "19055. Every claim for refund shall be in writing, shall be signed by the taxpayer or the taxpayer's authorized representative, and shall state the specific grounds upon which it is founded. A claim filed for or on behalf of a class of taxpayers shall do all of the following:
>
> (a) Be accompanied by written authorization from each taxpayer sought to be included in the class.
>
> (b) Be signed by each taxpayer or taxpayer's authorized representative.
>
> (c) State the specific grounds on which the claim is founded."

Petitioners misstate the record in asserting that the Board actively deterred taxpayers from filing individual claims for refund and then delayed in complying with the ruling in *Brown v. Franchise Tax Board*, 197 Cal.App.3d 300 (1987), until after the limitations period for individual claims had expired for two of the four tax years at issue. The purported basis of this assertion is the language of the Board's Public Service Bulletin No. 85-2, which petitioners quote in part at page 4 of the Petition (referred to as "an internal bulletin"). (See Respondent's Appendix, B-1.) Petitioners claim that by this internal bulletin the Board instructed its employees to misinform and mislead inquiring taxpayers regarding the need to file a timely claim for refund with respect to tax years later than those at issue in *Brown*. According to petitioners, the Board sought to misinform taxpayers that they should be patient until the *Brown* case was finally resolved so that claims for refund for later tax years would be time barred.

This hardly was the case. The Board established that the language from Public Service Bulletin 85-2 quoted by petitioners referred to the recommended response that Board employees should give to taxpayers inquiring about their claims for refunds already pending before the Board which involved the same issues raised in the *Brown* case. The bulletin did not refer to potential claims for refund which had not yet been filed. There was no plot to thwart taxpayers' claims for refund. The trial court specifically found that there was no evidence to support petitioner's equitable estoppel theory.

Petitioners misstate the record in claiming that "thousands of California residents . . . were penalized for their investment in federal obligations because, in compliance with the Board's advice to be 'patien[t],' they did not file timely notices of claim." (Petition, p. 12, ¶ 3.)

Petitioners submitted no evidence of any taxpayer being misled in this regard.

Further, petitioners erroneously assert that the Board persuaded the California Legislature to amend the claim filing requirements of Section 19055 in order to discourage refund claims for the post-1981 tax years. (Petition, p. 5.) Division Four of the First Appellate District Court of Appeal of the State of California noted in its decision in this case that the amendment to Section 19055 adding class claim filing requirements was drafted by the Board and enacted by the Legislature after the Board had "incurred extraordinary and unanticipated expenses of more than $1 million" in administering the *Brown* class action. (Petition, A-2.) Rather than finding any legislative intent to thwart class relief for tax refunds, the appellate court found that "section 19055 reflects the Legislature's express sanction for class actions." (Petition, A-6.) Thus, the 1986 amendment to Section 19055 for the first time allowed the filing of a class claim for tax refund where, as authoritatively determined (contrary to *Brown*) by the California Supreme Court, none had previously been permitted. (*Woosley v. State of California* 3 Cal.4th 758, 791-792, *cert. denied*, 113 S. Ct. 2416 (1992).)

ARGUMENT

THE COURT OF APPEAL'S HOLDING THAT THE CLASS CLAIM FILING REQUIREMENTS OF REVENUE AND TAXATION CODE SECTION 19055 ARE MANDATORY AND MUST BE STRICTLY ENFORCED, AND THAT PETITIONERS DID NOT COMPLY WITH SECTION 19055, IS AN INDEPENDENT AND CONSTITUTIONALLY ADEQUATE STATE GROUND; PETITIONERS LACK A JURISDICTIONAL BASIS FOR SUPREME COURT REVIEW.

A. The California holding at issue rests entirely upon an interpretation of California law.

Petitioners seek review of a California Court of Appeal holding which is based solely on California law and which constitutes an independent and adequate state ground. Lack of jurisdiction is clear in this case from the absence of any valid federal question in the petition.

Petitioners are essentially arguing that although an administrative tax refund procedure for pursuing a class claim remedy was available to them under Section 19055, and in spite of their own unexplained failure to even attempt to comply with the class claim filing requirements of this section, they should obtain tax refunds on behalf of countless unknown investor/taxpayers of the mutual funds in order to allegedly redress the federal fisc under the Supremacy Clause and 31 U.S.C. § 3124(a). This argument is purely result-oriented and challenges a holding which contains no federal element.

Prior to the amendment of Section 19055 in 1986, the California Personal Income Tax Law did not permit the filing of a class claim for tax refunds. (*Woosley*, *supra*,

3 Cal.4th at pp. 791-792.)[2/] The 1986 amendment to section 19055 expressly permitted, for the first time, the filing of a class claim but required that each member of the class authorize his or her inclusion in the class in writing and that each member of the class, or the class member's authorized representative, sign the claim for refund.

In 1986, similar amendments were made to section 26074 governing claims for refunds of bank and corporate taxes and in 1987, to section 6904 governing claims for refunds of sales and use taxes. The California Supreme Court noted that these amendments "were intended to spare the state the substantial administrative costs associated with identifying and notifying class members once a case had been certified as a class action." (*Woosley*, *supra*, 3 Cal.4th at p. 791.)

In fact it was the Board's expenditure of substantial administrative costs in administering the *Brown* class action (which, in light of *Woosley*, should not have been certified as a class action in the first place) which precipitated the written authorization amendments to Section 19055. (See Petition, A-2 and notes 3 and 8.) Far from petitioners' assertion that this was the second affirmative step taken by the Board to discourage refund claims (Petition, page

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2. The California Supreme Court specifically rejected the contention that prior to the enactment of amendments to sections 6904, 19055, and 26074, class claims were proper. (*Woosley*, *supra*, 3 Cal.4th 758, at pp. 791-792.) The *Woosley* Court stated: "The circumstance that, in amending sections 6904, 19055 and 26074, the Legislature chose to allow a narrowly circumscribed form of class claims, does not demonstrate that it previously had authorized a more expansive type of class claim." (*Woosley*, *supra*, 3 Cal.4th at p. 792.) Moreover, the Legislature's silence on the subject of class claims seeking refunds of taxes prior to the 1986 and 1987 amendments "did not constitute legislative authorization of such class claims." (*Ibid.*)

5), the Board-sponsored amendment of 19055 in fact created a class claim filing procedure where none had previously existed.

The Court of Appeal below stated: "The lesson of *Woosley* we take to be that statutes governing administrative tax refund procedures, backed as they are by a plenary constitutional authority, are to be strictly enforced." (Petition, A-10.) The California Supreme Court summarized these well established constitutional principles as follows:

> "The California Constitution expressly provides that actions for tax refunds must be brought in the manner prescribed by the Legislature. Article XIII, section 32, of the California Constitution provides in this regard: 'After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, *in such manner as may be provided by the Legislature.*' (Italics added.) This constitutional limitation rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues. (See *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638 [217 Cal.Rptr. 238, 703 P.2d 1131].)" (*Woosley, supra*, 3 Cal.4th at page 789.)
>
> "In sum, article XIII, section 32, of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature." (*Woosley, supra*, 3 Cal.4th at p. 792.)

The present petition challenges California's requirement that, in order to maintain a class action lawsuit for income tax refunds, a would-be representative

of the class who files a class claim for refund must strictly comply with the mandatory class claim filing requirements of section 19055 and file such class claim in a timely manner. The application of California's class claim filing requirements to the facts of this case constitutes an independent and constitutionally adequate state ground. This case is not entitled to Supreme Court review.

B. Under this Court's *McKesson* decision, the federal Constitution permits the state procedural requirement which forms the basis of the California holding.

The administrative tax refund procedural requirements of Section 19055 are of the type of procedural protections expressly permitted by this Court in *McKesson*, *supra*, 496 U.S. 18, 44-45. In *McKesson*, this Court recognized the State's concern that its obligation to provide refunds for an unconstitutional tax may "undermine the State's ability to engage in sound fiscal planning" but found that such concern was sufficiently met by "[a] State's freedom to impose various procedural requirements on actions for postdeprivation relief." (*McKesson*, *supra*, 496 U.S. at p. 45.) The Court provided examples of permissible procedural requirements, noting, among others, that the state might "provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; [and] enforce relatively short statutes of limitations applicable to such actions, ..." (Footnote omitted.) (*Id.* at p. 45.) Under the *McKesson* circumstances, this court found that Florida's "ability in the future to invoke such procedural protections suffices to secure the State's interests in stable fiscal planning when

weighed against its constitutional obligation to provide relief for an unlawful tax." (*Ibid.*)[3/]

The class claim filing requirements of Section 19055 clearly fit within *McKesson's* example of a permissible state requirement for "paying under protest or providing some other timely notice of complaint." (496 U.S. at p. 45.)

C. The decision below does not conflict with this Court's decision in *Harper*.

Petitioners contend that *Harper v. Virginia Dep't of Taxation*, 509 U.S. __, 113 S. Ct. 2510, 125 L.Ed 2d 74 (1993) stands for the proposition that "the remedy for unconstitutional state taxation is governed fundamentally by *federal* law" and that "[a] full refund is the *only* remedy that is sufficient under federal law where a State has imposed a tax like California's that federal law placed 'beyond [its] power to impose.' [quoting *McKesson*, 496 U.S. at 39.]" (Italics in the original, Petition, page 8.) Petitioners thus argue that "*Harper's* holding that the dictates of the Supremacy Clause may not be evaded on the basis of state fiscal interests (113 S. Ct. at 2519) perforce bars the application of a fiscal-based state law like Section 19055 when its purpose and effect is to deny complete market relief to the United States." (Petition, p. 16.)

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3. Petitioners attempt to give significance here to this Court's use of the phrase, "in the future", in *McKesson*. This Court was simply pointing out that apparently no procedural safeguard applied in the *McKesson* case itself, but that Florida could take such steps "in the future." In the present case, California's procedural safeguards in section 19055 were clearly in full effect at the time petitioners filed their claim for refund. There is no need to consider what California might do in the future; at the time of these claims, California had already acted in a way which is fully permissible under *McKesson*.

Petitioners have never challenged the validity of Section 19055 or its application to taxpayers other than the mutual funds' investor/taxpayers. Petitioners do not challenge the authority of the California Legislature to enact the class claim filing requirements contained in this section. In fact, contrary to petitioners' allegations, the purpose of the amendments to Section 19055 was not to "deny market relief to the United States" but to provide an administrative mechanism to identify potential class members and obtain their specific authorization regarding inclusion in the class.

The State's entire tax scheme is premised upon self-assessment, and in the case of claims for refund, self-identification by claimants and specification of all grounds for the claim for refund by the claimant. The Board was not, and is not, administratively equipped nor fiscally prepared to administer class relief where the identity of the claimants is unknown and the Board must solicit claims for refund against itself.

Moreover, tax refund cases present a unique situation in that each taxpayer who becomes a member of a class action thereby agrees to put the question of his tax liability for the entire tax year or years, at issue. By joining a class action, each taxpayer thereby subjects himself to a desk audit of his tax return(s) for the year(s) at issue. Written authorization from the taxpayer seeking to join the class action ensures that the taxpayer willingly was submitting himself or herself to the potential burdens as well as the potential benefits of such status.

In addition, the enactment of class claim filing requirements of Section 19055 does not have the effect of denying "complete market relief to the United States." This Court has stated that "[i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he

can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful back-ward looking relief to rectify any unconstitutional deprivation." (*McKesson*, *supra*, 496 U.S. at p. 31.) The Board clearly contemplated tax refunds as a remedy for any unlawful tax collection in this case as opposed to some other "corrective action by the State" which would be permissible where the State is found to have imposed an impermissibly discriminatory tax. (See *McKesson*, *supra*, 496 U.S. at pp. 40-41.)

The State's requirement of the filing of an administrative claim for refund as a prerequisite to a lawsuit for a tax refund predates this action by over 40 years.[4/] Thus, the California claim filing requirement clearly is not a "new state-law obstacle with the express purpose of frustrating the market relief that federal law requires." (Petition, p. 21.) All of the investor/taxpayers whom petitioners seek to represent had the opportunity to file timely individual claims for refund. The timely individual claims for refund filed by other investor/taxpayers are being handled administratively by the Board and refunds are being issued.

Petitioners erroneously assert that prior to the time that the tax at issue herein was collected, an administrative claim for refund was permitted to be filed by a single claimant on behalf of an absent class and that the Board and the California Legislature "changed this rule" to "restrict a *federal* tax remedy." (Italics in the original, see Petition, p. 21 and note 27.) Petitioners cite to *City of San Jose v. Superior Court* 12 Cal.3d 447 (1974), *Schoderbek v. Carlson* 113 Cal.App.3d 1029 (1980), *Lattin v. Franchise Tax Bd.* 75 Cal.App.3d 377 (1977), and *Santa*

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4. The original Section 19055 (see note 2, *infra*) was added in 1943 (stats. 1943, c. 659, §1.)

Barbara Optical Co. v. State Bd. of Equalization 47 Cal.App.3d 244 (1975). (Petition, note 27.)

The California Supreme Court specifically has held that prior to the 1986 amendments to Revenue and Taxation Code sections 6904 and 19055, and the 1987 amendments to Section 26074, class claims seeking tax refunds were not statutorily authorized and therefore impermissible under Article XIII, section 32 of the California Constitution. (*Woosley*, *supra*, 3 Cal.4th at p. 792.) The *Woosley* court specifically disapproved of the aforementioned decisions to the extent that they held to the contrary.

Having themselves filed a timely individual claim for refund, petitioners themselves are not precluded from obtaining a refund.[5/] Had they complied with the class claim filing requirements of Section 19055, petitioners could have pursued refunds on behalf of the class of the mutual funds' investor/taxpayers that they now seek to represent. Any fault for "failure to make the market whole by awarding refunds to substantially all aggrieved investors" (Petition, page 16) does not belong to the Board or the State of California but must be attributed to the petitioners who failed to follow California's procedural requirements on actions for postdeprivation relief which are of the type expressly found permissible by this Court in *McKesson*.

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5. The Board has informed petitioners of its willingness to grant the claims for refund of petitioners Donald and Joan Farrar, as individuals, but not as representatives of any class for refund of taxes paid on distributions from two of the plaintiff mutual funds. (See Petition, A-3, note 4.)

D. *Felder* has no application to this tax refund case.

Petitioners do not claim that section 19055 is invalid as to all taxpayers. They argue that it is only invalid as to the taxpayers who had invested in the types of mutual funds involved in *Brown*.

In the hopes of evading the application of section 19055 with respect to this single class of taxpayers (i.e. the mutual funds' investors who did not file a timely claim for refund and were not properly included in any class claim for refund), petitioners argue that this Court's reasoning in *Felder v. Casey*, 487 U.S. 131 (1988), fits this case well and is "particularly instructive." (Petition, p. 18.) *Felder* is inapposite and has no application to this tax refund case.

In *Felder*, this Court held that under the principles of federalism and the Supremacy Clause, 42 U.S.C. § 1983 preempted the application of Wisconsin's notice-of-claim statute to a § 1983 action brought in state court. This Court's decision was based upon a finding that "the notice-of-claim statute at issue herein conflicts in both its purpose and effects with the remedial objectives of § 1983, and . . . its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court . . . ." (*Felder*, *supra*, 487 U.S. at p. 138.)

This Court held:

> "Wisconsin's notice-of-claim statute undermines [§ 1983's] 'uniquely federal remedy,' *Mitchum v. Foster*, 407 US, at 239, 32 L Ed 2d 705, 92 S Ct 2151, in several interrelated ways. First, it conditions the right of recovery that Congress has authorized, and does so for a reason manifestly inconsistent with the

> purposes of the federal statute: to minimize governmental liability. Nor is this condition a neutral and uniformly applicable rule of procedure; rather, it is a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority. Second, the notice provision discriminates against the federal right. While the State affords the victim of an intentional tort two years to recognize the compensable nature of his or her injury, the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right. Finally, the notice provision operates, in part, as an exhaustion requirement, in that it forces claimants to seek satisfaction in the first instance from the governmental defendant. We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." (*Felder, supra*, 487 U.S. at pp. 141-142.)

In contrast, a lawsuit to recover a tax refund does not involve a "uniquely federal remedy" and the requirement of the exhaustion of administrative remedies is well established in both state and federal tax law. In fact, the "doctrine of exhaustion of administrative remedies 'has received particular emphasis in tax enforcement cases.' (*People v. West Publishing Co.* 35 Cal.2d 80, 88 (1950) [citation omitted]." (*Barnes v.State Bd. of Equalization* 118 Cal.App.3d 994, 1001 (1981).)

California case law has made clear that the judicially developed rule of exhaustion of administrative remedies is distinguishable from the exhaustion prerequisite in tax refund actions which is constitutionally compelled. In

Patane v. Kiddoo 167 Cal.App.3d 1207, 1214 (1985), the Court of Appeal stated:

> 'The doctrine of exhaustion of administrative remedies was evolved by the courts to promote comity between coequal branches of government and to relieve overburdened courts from the need to deal with cases where effective administrative remedies are available. [Citation omitted.] **The judicially developed rule and, perforce, its exceptions, have no application to an action to recover a tax paid. Although exhaustion of administrative remedies is prerequisite to such an action, it is compelled not by the judicially created doctrine of comity and convenience, but by the constitutional grant of power to the Legislature to prescribe the manner of proceeding in such cases.** . . . We are not at liberty to alter the constitutionally authorized process by engrafting onto it exceptions borrowed from the judicially fashioned doctrine of exhaustion of administrative remedies. The authority to make such changes is confided in the Legislature by article XIII, section 32, of the Constitution, a provision which, we have recently been reminded by our high court, 'means what it says.' *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 284 [165 Cal.Rptr. 122, 611 P.2d 463].)" (Emphasis added.)

Similarly, it is well established under federal law that a taxpayer is required to file a claim for refund as a jurisdictional prerequisite to a suit for refund of taxes. (26 U.S.C. § 7422(a) and 26 C.F.R. 301.6402-2(b)(1); *United States v. Felt & Tarrant Co.*, 283 U.S. 269, 272, 51 S.CT. 376, 75 L.Ed.2d 1025 (1931); *Martinez v. United States*, 595 F.2d 1147, 1148 (9th Cir. 1979); *Omnibus Financial Corp. v. United States*, 566 F.2d 1097, 1101 (9th Cir. 1977.) Under federal case law, federal taxpayers must file

individual claims for refund, not class claims for refund, before they are entitled to bring a tax refund lawsuit. (See *Heisler v. United States*, 463 F.2d 375 (9th Cir. 1972, *cert. denied*, 410 U.S. 927 (1973); *Sutherland v. Egger*, 605 F.Supp. 28, 30 (W.D. Pa. 1984).

Thus, in contrast to the Wisconsin notice-of-claim provisions in *Felder*, the class claim filing requirements of Section 19055 constitute "a neutral and uniformly applicable rule of procedure", the purpose and validity of which must be recognized in light of similar administrative prerequisites to suit provided for under federal tax law.

In summary, the federal Constitution does not mandate that the States must provide for litigation of tax refund actions as class actions. The class claim filing requirements of Section 19055 are reasonable and strictly procedural in nature. The application of these procedural requirements in this case constitute an independent and adequate state ground that is not reviewable in this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California
TIMOTHY G. LADDISH
Assistant Attorney General
RICHARD F. FINN, Supervising
Deputy Attorney General
JOYCE E. HEE*
Deputy Attorney General
(*Counsel of Record)
455 Golden Gave Ave., Rm. 6200
San Francisco, CA 94102-3658
Telephone: (510) 286-4043
Counsel for Respondent

December 10, 1993

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APPENDIX "A"

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APPENDIX "B"

Public Service Bulletin No. 85-2 . . . . . B1

26 C.F.R.
§ 301.6402-2. Claims for credit or refund.

* * *

(b). Grounds set forth in claim.
(1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

* * *

26 U.S.C.
§ 7422. Civil actions for refund.

(a) No suit prior to filing claim for refund. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim

for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. * * *

Revenue & Taxation Code
§ 6904. Claim: writing; statement of grounds

(a) Every claim shall be in writing and shall state the specific grounds upon which the claim is founded.

(b) A claim filed for or on behalf of a class of taxpayers shall do all of the following:

(1) Be accompanied by written authorization from each taxpayer sought to be included in the class.

(2) Be signed by each taxpayer's authorized representative.

(3) State the specific grounds on which the claim is founded.

Rev. & Tax. Code
§ 26074. Claim for refund; writing; grounds; class claims

Every claim for refund shall be in writing, shall be signed by the taxpayer or the taxpayer's authorized representative, and state the specific grounds upon which it is founded. A claim filed for or on behalf of a class of taxpayers shall do all of the following:

(a) Be accompanied by written authorization from each taxpayer sought to be included in the class.

(b) Be signed by each taxpayer or taxpayer's authorized representative.

(c) State the specific grounds on which the claim is founded.

February 7, 1985

PUBLIC SERVICE BULLETIN NO. 85-2

READ IMMEDIATELY

Benham Corp/Capital Preservation Class Action Suit

Purpose of Bulletin

To provide information on the Benham Corporation class action suit (*Brown, et al.*, v. *FTB*; SP #803759) and define public service procedures for handling contacts relating to this matter.

Background

The Franchise Tax Board is involved in a class action suit which challenges the taxability of distributions (dividends or benefits) received from several funds administered by the Benham Corporation. The suit contends that since the three funds (Capital Preservation Fund, Capital Preservation Fund II, and Capital Preservation Note Trust) derived their income exclusively from United States Treasury debt securities, the distribution of the income should not have been taxed.

*In March 1984, the superior Court decided the issue in favor of the class of taxpayer/investors for the TYS 1978 - 1981.

*The Superior Court has ordered FTB to issue notification and tax refund claim forms to the class of taxpayer/investors for the TYS 1979-1981. The purpose of the notice is to

- inform the investors of the class action suit and the amount of refund they may be entitled to receive.

- provide a claim form on which they may elect to be included in the plaintiff class and, if appropriate, challenge the refund calculated by FTB.

*The case is not yet closed, and a considerable period of time could elapse before all appeals are exhausted.

What FTB Is Doing

The "Tax Refund Claim Form" and Notice of Plaintiff Class Action Determination" (see copies attached) are being sent to all identified investors.

* Approximately 11,000 notices were mailed on February 6, 1985 with a taxpayer response by April 1, 1985.

* An estimated 80,000 additional notices will be mailed April 30, 1985 with a taxpayer response date of July 1, 1985.

Responsibilities The Document Resolution Section is responsible for reviewing the returns and completing the information on the claim form. That unit will also handle the returned claim forms and any correspondence, amending returns or other information pertaining to this court case.

Important!! NOTE Because the taxpayer's legal rights as members of the plaintiff class could be involved, public service personnel should not attempt to explain the notices or claim forms or to advise the taxpayer about what to do, except as authorized below under "What to tell the taxpayer."

What to Tell the Taxpayer All communications are to be in writing. The procedures which follow are to assure that inquiries are handled uniformly and information gets to the correct unit.

(Plaintiff's Exhibit No. 5, Joint Appendix In Lieu of Clerk's Transcript (on Appeal), pages 397-398)